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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Intervenor-Petitioner,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Intervenor-Petitioner,

VS.

PEDRO CASTRO, et al.,
Respondents.

NANCY BEECHER, et al.,
Petitioners,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

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No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
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vs.

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Respondents.

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Intervenor-Petitioner,

vs.

PEDRO CASTRO, et al.,
Respondents.

No. 82-259

NANCY BEECHER, et al.,
Petitioners,

vs.

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of petitioners, Boston Firefighters Union, Local 718, *et al.* Consent to the filing of

this brief has been granted by intervenor-petitioner, Boston Police Patrolmen's Association, Inc., intervenor-petitioner, Boston Firefighters Union, Local 718, and petitioners, Nancy B. Beecher, *et al.* Respondents, Boston Chapter, NAACP, *et al.*, have withheld consent. The consents have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal Foundation's members, contributors, and supporters have expressed concern regarding affirmative action programs which result in harm to innocent persons, one of the issues in this case. In order to voice these interests, the Board of Trustees of Pacific Legal Foundation, the majority of whom are attorneys, has authorized the filing of this brief.

Because the interests of petitioners center mainly upon protection of seniority rights and questions of federalism, Pacific Legal Foundation believes that the equal protection issues presented by this litigation could receive inadequate attention from the parties. Whether equal protection of the laws extends to all persons without regard to race or ethnicity is an issue which deserves briefing from as many viewpoints as possible. This is an area of the law which is unsettled at present. Pacific Legal Foundation believes that its position has broad public support, and that its public policy perspective will allow it to provide the Court with a more thorough briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed amicus briefs in *Regents of the University of California v. Bakke; United Steelworkers of America v. Weber*; and *Fullilove v. Klutznick.*

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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December, 1982

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OF THE

United States

OCTOBER TERM, 1982

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982).

STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, adopts the statement of the case set forth by petitioners.

SUMMARY OF THE ARGUMENT

The orders issued by the District Court discriminate against certain police officers and firefighters on the basis of race without compelling justification and are thus invalid under the Equal Protection Clause. The plan protects the jobs of minority officers never discriminated against and results in the discharge of white officers hired *after* the affirmative action hiring plan was in effect. The orders thus fail to tailor the remedy to the scope of the prior unintentional hiring discrimination. The orders unnecessarily trammel the interests of nonminority individuals in a manner unprecedented in any court-approved affirmative action plan. The courts below justified their decisions by pointing out the broad, equitable powers possessed by a federal court. The *effect* of the orders, superseding a valid state statute never challenged and violating the constitutional rights of innocent officers, was totally ignored. The decision of the Court of Appeals should therefore be reversed.

ARGUMENT

I

USING RACE AS A CONSIDERATION IN DETERMINING THE ORDER OF LAYOFFS VIOLATES THE EQUAL PROTECTION CLAUSE

The United States District Court for the Eastern District of Massachusetts granted a motion which prohibits reduction in the percentage of blacks and Hispanics in city police and fire departments below levels existing at the

commencement of layoffs due to budget restrictions. The order modified a prior consent decree which implemented an affirmative action hiring program but did not address layoffs. To accomplish its purpose, the District Court ordered that the police and fire departments establish separate seniority lists for minority officers and nonminority officers and maintain the percentages of minorities even though this meant nonminority officers with greater seniority were laid off before minority officers with less seniority.

The orders of the District Court discriminate against identifiable officers on the basis of race and are thus invalid. Oral argument in the Court of Appeals revealed that of 258 police officers laid off under the order, 224 were white, but that the seniority system operating in a color-blind fashion would have resulted in only 126 white officers being laid off. *Boston Chapter, NAACP*, 679 F.2d at 976-77 n.14. The figures also revealed that white officers with over eight years seniority were laid off before minority counterparts with less than two years on the force. *Id.* The record clearly demonstrates discrimination on the basis of race.

The crucial inquiry is whether that discrimination can pass muster under the Equal Protection Clause. The proper test is one of strict scrutiny: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (citations omitted). This standard demands an inquiry into whether there exists a compelling interest in discriminating against these few, identifiable white officers. *See Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972). The Court of Appeals found a compelling interest in "[t]he

fact of past discrimination[1] agreed to in both cases." *Boston Chapter, NAACP,* 679 F.2d at 977. The court tried to avoid the "two wrongs do not make a right" argument by stating that "whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics." *Id.* This rationale fails because the layoffs largely affect only employees hired since the affirmative action program commenced. Thus the whites who reaped past benefits were not laid off, and blacks and Hispanics allegedly victimized by prior hiring practices were not protected by the orders. The vast majority of individuals in both groups had sufficient seniority to protect their jobs whether the order issued or not. Oddly enough, hearings were never conducted to determine who was, and who was not, discriminated against. Therefore, the District Court should have refused to grant the modification because it impermissibly extended the scope of the remedial orders beyond "the nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 744 (1974). There is no compelling justification for protecting persons who have not been discriminated against from the operation of a bona fide seniority system, to the detriment of other individuals who have done no wrong other than to be born with a certain skin color. The "group" analysis of the Court of Appeals cannot stand up to the equal protection guarantees which our laws

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[1]Only discriminatory impact was alleged. If violations of the Equal Protection Clause are alleged, *purpose* to discriminate must now be shown. *Washington v. Davis,* 426 U.S. 229, 245 (1976). The majority rule is that 42 U.S.C. § 1981 claims must also prove intentional discrimination. *Croker v. Boeing Company (Vertol Division),* 662 F.2d 975, 984-85 (3d Cir. 1981).

afford every citizen *individually*.[2] "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

The ordered modification cannot stand because it "unnecessarily trammels" the rights of the nonminority workers. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court approved a private, voluntary affirmative action plan which did not result in the discharge of white workers.[3] In *Fullilove v. Klutznick*, Chief Justice Burger noted that burdens on innocent parties from the affirmative action plan were "relatively light." 448 U.S. 448, 484 (1980). Similarly, Justice Powell found these burdens on white workers to be "not sufficiently significant." *Id.* at 515 (Powell, J., concurring). In the instant case, on the other hand, a federal court has granted a modification which takes away vested seniority rights from innocent persons, resulting in the loss of their jobs. There exists no rational basis, and certainly no compelling justification, for such a "remedy."

The separate seniority lists ordered by the District Court are strangely reminiscent of the separate but equal plan set forth in *Plessy v. Ferguson*, 163 U.S. 537 (1896). This type of "equality" has been consistently disapproved by

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[2] "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

[3] "At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." *United Steelworkers of America*, 443 U.S. at 208.

the Court because, as it noted in *Shelley v. Kraemer*, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22. There is no compelling interest for the separate classification approved by the lower courts because the record clearly establishes that "there is no evidence that defendants [Massachusetts Civil Service Commission] ever expressed a discriminatory purpose or used any practice which on its face was invidiously discriminatory." *Castro v. Beecher*, 334 F. Supp. 930, 935 (E.D. Mass. 1971) (the police case). Thus, not only have respondents failed to show that the orders will aid specific victims of past discrimination, they are arguing for racial classifications based upon factual findings which have no legal significance under *Washington v. Davis*, 426 U.S. 229, 244-45 (1976). There this Court discredited the view "that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." *Id.* at 245. The Court noted that several federal courts of appeal had, in several contexts including public employment, erroneously held proof of disproportionate impact sufficient to prove discrimination. The Court expressly cited *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972), as one such wrongly decided case. *Washington v. Davis*, 426 U.S. at 244 & n.12. In the next term, the Court reaffirmed this part of *Washington v. Davis*, noting that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

The Court of Appeals in the present case, however, ignored the relevance of these cases, finding that "the pattern of relief which the present modifications . . . seek

to preserve was conclusively established prior to those decisions." *Boston Chapter, NAACP*, 679 F.2d at 971. This argument proves too much. It is precisely that "pattern of relief" that is based upon erroneous conclusions of law. Thus, for the court below to hide behind its right to modify a previous order,[4] while ignoring the obvious fallacies contained therein, is simply an abuse of its equitable powers.

The time is ripe to clear the muddied waters surrounding the Equal Protection Clause.[5] The remaining vestiges of racial discrimination will never disappear until the courts command an interpretation and observance of the law that is color-blind. Justice Douglas observed that "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting). With all respect, this Court has been less than decisive in interpreting the mandate of the Constitution.[6] The lack of clear guidance has given lower courts

[4]It is questionable whether the District Court could even "seek to preserve" the percentages of minorities on the forces. The Supreme Court has held that a federal court in this context was correct in only *implementing* the remedial devices and not overseeing them. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976).

[5]*See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); United *Steelworkers of America v. Weber*, 443 U.S. 193 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). These three decisions resulted in fifteen opinions; at least one by each of the nine justices.

[6]"In ten years of wandering about this political thicket, we have not yet found the burning bush of final explanation." *Graves v. Barnes*, 343 F. Supp. 704, 708 (W.D. Tex. 1972), *aff'd sub nom. Archer v. Smith*, 409 U.S. 808 (1972), *modified sub nom. White v. Regester*, 412 U.S. 755 (1973), *vacated as moot*, 422 U.S. 935 (1973).

unbridled discretion to become involved in politics and judicial activism at the expense of innocent citizens. The line must be drawn when those citizens are forced by court order to relinquish their jobs.

II

A VALID STATE SENIORITY STATUTE MAY NOT BE SUPERSEDED BY A FEDERAL COURT MERELY TO GRANT INCREASED SENIORITY TO SOME TO THE DETRIMENT OF OTHERS

By requiring that separate seniority lists be maintained for whites and minority officers, the District Court effectively preempted operation of a valid state statute, MASS. GEN. LAWS ANN. ch. 31, § 39 (West 1978). In the section of its opinion attempting to justify this normally unconstitutional conduct (*Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)), the Court of Appeals began by noting that "[t]here are three Supreme Court cases that focus on the problem of seniority rights and discrimination against minorities." *Boston Chapter, NAACP*, 679 F.2d at 973. In discussing the first of these (*Franks v. Bowman Transportation Company*, 424 U.S. 747, 779 (1976)), the Court of Appeals acknowledged that the decision granted relief to "'*identifiable* victims of illegal hiring discrimination.'" *Boston Chapter, NAACP*, 679 F.2d at 974 (emphasis added) (*quoting Franks v. Bowman Transportation Company*, 424 U.S. 747, 779 (1976)). The *Franks* decision stated that "[c]ertainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract." *Id.* at 778. In the present case, the court order

does in fact deprive other employees of vested seniority rights. In *Franks*, the remedy was an award of seniority status to the identifiable victims who would have been hired *but for* the discrimination, by making seniority retroactive to the dates of the plaintiffs' employment applications. The District Court in the instant case, on the other hand, never even attempted to determine who had suffered because of the prior discrimination, choosing instead to abuse its equitable powers by modifying the existing seniority system. The Massachusetts statute was never challenged by any party in the case and yet the District Court felt compelled to intrude into the legislative arena of a state and suspend the operation of a valid state statute.

Next the Court of Appeals cited *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). That decision granted relief to minority group members *who had applied previously* for a line-driver position. Nonapplicants had to carry a heavy burden of showing individually that they would have applied "but for [their] knowledge of the company's discriminatory policy." *Id.* at 371. The Supreme Court also called for a balancing of the remedial interests of identifiable victims of discrimination against "legitimate expectations of other employees innocent of any wrongdoing." *Id.* at 372. This was deemed a "delicate task" by the Court. Apparently, the Court of Appeals in the present case did not undertake this task, delicately or otherwise.[7]

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[7] "[I]n the exercise of its equity powers, the Court cannot ignore the effect any change might have on the party opposing the [modification] motion." *Coalition of Black Leadership v. Cianci*, 480 F. Supp. 1340, 1342 (D.R.I. 1979).

The Court of Appeals also discussed the most recent decision, *American Tobacco Company v. Patterson*, 102 S. Ct. 1534 (1982). That decision granted bona fide seniority systems broad protections from attack on grounds of unintentional discrimination. It held that perpetuation of independent discriminatory employment practices by application of a bona fide seniority system does not form a sufficient basis for invalidation of the system. *Id.* at 1541. *Accord, Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1784 (1982).

The Court of Appeals ignored the real issues in this case, choosing instead to view it as one in which it exercised its power to preserve relief achieved pursuant to previous orders. It follows logically that a federal court could, for example, maintain indefinitely "'separate but equal'" orders granted before 1954 even after *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), was decided. This ignores the operation of stare decisis in our system of justice. Respondents fully realize that *Washington v. Davis* will not allow the relief they seek if they bring a new suit.[8] The results should be no different in a modification proceeding.

CONCLUSION

The "make-whole" remedy envisioned by the *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), and *Franks v. Bowman Transportation Company* decisions was designed to assist only the actual victims of discrimination. Those persons not subjected to past acts of discrimination should not benefit from overboard relief at the expense of

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[8] *See, supra* note 1.

a few, innocent workers. No one can refute that certain minorities have been discriminated against in the past. As a society we have come a long way, and we must be vigilant in enforcing the laws which provide remedies for civil rights violations. Our legislators have made certain that anyone who is discriminated against on the basis of race now has a remedy for this violation of his or her rights. Disadvantaged individuals may be given a temporary advantage in order to restore the status quo but for the discrimination, but such an advantage for some may not work to discriminate against others *on the basis of race* as occurred in the present case. Our national commitment to equal rights under the law does not command it; our Constitution will not allow it.

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